

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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WILMINGTON, DE 19801
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April 28, 2010

Willis R. Miller
SBI #
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Re: *Miller v. Taylor et al.*
C.A. No. 08C-12-263 JRS
Upon Willis R. Miller's Motion for Appointment of Counsel.
DENIED.

Dear Mr. Miller and Counsel:

The Court has reviewed Plaintiff's Motion for Appointment of Counsel ("the Motion"). For the reasons set forth below, the Motion is **DENIED**.

There is a well-recognized right to appointed counsel for indigent defendants in criminal cases.¹ Courts have been reluctant, however, to extend that right to indigent plaintiffs in civil cases, and have almost universally declined to do so.² Unfortunately, this case is no exception.

Plaintiff argues that the “six prong test” of *Tabron v. Grace* controls.³ The *Tabron* factors, however, have not been applied by this Court in similar cases.⁴ Rather, Delaware State courts have considered Motions for Appointment of Counsel

¹ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² See, e.g., *Deputy v. Conlan*, 2008 WL 495791 (Del. Super. Feb. 13, 2008) (finding that indigent plaintiff in civil rights suit against various prison officials did not demonstrate that he was denied “meaningful access” to the Court, such that appointment of counsel would be warranted); *Jenkins v. Dover Police Comm’r*, 2002 WL 663912 (Del. Super. Apr. 5, 2002) (declining to appoint counsel for indigent plaintiff in a civil suit where plaintiff did not present “special and compelling circumstances” to overcome the State’s strong countervailing interest in maintaining order and discipline in its penal institutions).

³ 6 F.3d 147 (3d Cir. 1993). First, *Tabron* establishes a threshold matter that must be satisfied before the Court will undertake an analysis of the six factors: the Court must find that Plaintiff’s claim has “some merit in fact and law.” If the Court finds that Plaintiff’s claim is not malicious or frivolous on its face, the analysis then proceeds to the six remaining *Tabron* factors: “(1) the plaintiff’s ability to present his or her own case; (2) the complexity of the legal issues; (3) the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue such investigation; (4) the amount a case is likely to turn on credibility determinations; (5) whether the case will require the testimony of expert witnesses; and (6) whether the plaintiff can attain and afford counsel on his own behalf.” Where the balance of these factors weighs in favor of the movant, the Court should attempt to retain counsel for the indigent plaintiff. *Id.* at 155-57.

⁴ See, e.g., *Deputy*, 2008 WL 495791 (applying due process “meaningful access” standard); *Jenkins*, 2002 WL 663912 (same); *Vick*, 1986 WL 8003 (Del. Super. Apr. 14, 1986) (same). The Court notes that all of the Delaware cases that apply the *Tabron* factors are federal cases in which the plaintiffs allege, at least in part, violations of federal civil rights. See generally *Green v. First Corr. Med.*, 430 F.Supp.2d 383 (D. Del. 2006); *Gillis v. Toliver*, 2005 WL 2464991 (D. Del. Oct. 6, 2005); *Williams v. First Corr. Med.*, 2004 WL 2434307 (D. Del. Oct. 13, 2004); *Marvel v. Prison Indus., Inc.*, 2002 WL 199883 (D. Del. Feb. 7, 2002).

under the more narrow framework of the 14th Amendment Due Process Clause. This Court previously has held that “[u]nder *Lassiter* [*v. Department of Social Services*], ‘when an indigent civil litigant could not possibly be deprived of his personal liberty as a direct result of the litigation, the Constitution does not require, in the absence of special and compelling circumstances, the appointment of counsel.’”⁵ Therefore, the appropriate analysis for the Court to undertake in deciding the Motion is the three-prong due process analysis set forth by the United States Supreme Court in *Matthews v. Eldridge*.⁶ *Matthews* requires the Court to balance “(1) the private interests at stake, (2) the government’s interest and (3) the risk that the procedure without counsel would lead to erroneous results.”⁷

As to the first *Matthews* factor, the private interest at stake here is Plaintiff’s right to meaningful access to the Courts. “Meaningful access has been interpreted to mean ‘either access to an adequate law library or legal assistance in the preparation of complaints, appeals, petitions, etc., though the State is vested with discretion to select the method by which to implement this constitutional guarantee.’”⁸ In this case, Plaintiff has not shown that his access to the Court has been restricted. The case

⁵ *Jenkins*, 2002 WL 663912, at *2 (quoting William L. Dick, Jr., Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 Wm. & Mary L. Rev. 627, 628 (1989)).

⁶ 424 U.S. 319, 321 (1976).

⁷ *Jenkins*, 2002 WL 663912, at *2 (citing *Matthews*, 424 U.S. at 321).

⁸ *Deputy*, 2008 WL 495791, at *1 (quoting *Vick*, 1986 WL 8003, at *2).

law is clear that mere allegations of limits on the amount of time an inmate can spend in the prison library are not sufficient to create a right to appointed counsel in a civil case.⁹ Moreover, in this case, Plaintiff already has filed a complaint, a Petition to Proceed *in Forma Pauperis*, an Answer to Defendant Rodgers' First Set of Interrogatories, the present Motion, and an Objection to the State Defendant's Motion for Leave to File a Responsive Pleading Out of Time. These filings indicate that Plaintiff is capable of complying with the Court's rules and procedures and that appointment of counsel is not necessary to ensure meaningful access.¹⁰

The second *Matthews* factor requires the Court to examine the government's interest(s). It is well established that "the State ha[s] a 'strong countervailing interest in maintaining order and discipline in its penal institutions.'"¹¹ This strong interest, when considered in the context of the extraordinary remedy Plaintiff seeks, means that Plaintiff must make a very strong showing that his private interest in meaningful access outweighs this strong and well-recognized State interest.¹² Plaintiff has failed to make such a showing because he has not presented the Court

⁹ *Vick*, 1986 WL 8003, at *3 ("The allegation that the prison library is only accessible on a very limited basis, without greater specificity, is insufficient to defeat the State's strong countervailing interest in maintaining order and discipline in its penal institutions.").

¹⁰ *See id.* (noting that plaintiff's citation of case law diminishes his claim that he has been denied "meaningful access" such that appointment of counsel would be warranted).

¹¹ *Jenkins*, 2002 WL 663912, at *2; *Vick*, 1986 WL 8003, at *3.

¹² *See Jenkins*, 2002 WL 663912, at *2-3.

with any information that sets his case apart from the volume of cases in which inmates allege claims of medical negligence and violation of civil rights against prison officials or prison medical staff.

Finally, the complexity of the matter and the risk of a wrong outcome do not overcome the State's strong interest in maintaining order and discipline in its penal institutions. The Court notes that a plaintiff's diminished chance of success in the absence of appointed counsel, without more, does not outweigh the State's strong interest in maintaining order in penal institutions.¹³ In addition, the case law is clear that a routine medical malpractice claim is not complex enough to warrant the appointment of counsel for an indigent plaintiff because both medical malpractice suits and inmate suits against prison officials are common.¹⁴ Moreover, and perhaps most importantly, Plaintiff has not made any representations to the Court about his attempts, if any, to retain private counsel to represent him in this action.¹⁵ Attorney's fees are available in civil rights actions, and attorneys regularly take medical

¹³ *Vick*, 1986 WL 8003, at *3.

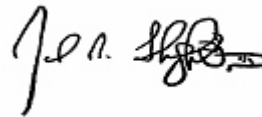
¹⁴ See, e.g., *Gibson v. Tolbert*, 102 S.W.3d 710, 713 (Tex. 2003); *Conely v. Brackenridge Hosp.*, 2007 WL 2214484, at *3 (Tex. App. July 31, 2007); *Sneed v. Univ. of Tex. Med. Branch Managed Care—Galveston*, 2006 WL 250828, at *4 (Tex. App. Feb. 2, 2006).

¹⁵ See *Jenkins*, 2002 WL 663912, at *3 (noting plaintiff's failure to show his efforts to retain private counsel, and ultimately denying plaintiff's motion for appointment of counsel).

malpractice cases on a contingency fee basis.¹⁶ The Court has not been presented with any information that would allow it to conclude that Plaintiff's indigence alone is responsible for his inability to obtain counsel without the Court's assistance.¹⁷

Unfortunately, Plaintiff's Motion does not set forth the facts necessary to warrant the extraordinary remedy of court-appointed counsel that he seeks. Therefore, Plaintiff's Motion for Appointment of Counsel is **DENIED** without prejudice. Plaintiff is not precluded from filing a second Motion for Appointment of Counsel if he is able to make the showing necessary to justify the extraordinary measure of appointing counsel to represent him in this civil case.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joe R. Slights, III", with a stylized flourish at the end.

Joseph R. Slights, III

JRS, III/sb

¹⁶ *Benner v. Corr. Med. Serv.*, 2008 WL 4215972, at *1 (Del. Super. July 28, 2008) ("Many attorneys work on a contingency fee basis; i.e., you pay them only if you win an award. Furthermore, attorneys' fees may be awarded in a successful action filed pursuant to 42 U.S.C. § 1983. Thus, the fact you are indigent does not mean you cannot obtain an attorney."). The Court notes that in *Benner*, the plaintiff attempted to hire an attorney but was ultimately unsuccessful. The *Benner* Court was aware of this, and still found that the plaintiff had the opportunity to obtain an attorney to represent him and was, therefore, precluded from having an attorney appointed for him. *Id.*

¹⁷ As a practical matter, Plaintiff's motion for appointment of counsel really seeks an order appointing counsel to represent the plaintiff either *pro bono* or subject to any contingency or statutory fees that counsel may be able to recover. Neither this Court, nor any other court (to this Court's knowledge) has funding available to pay court-appointed counsel in a civil case.